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No. 93-77

(2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LINDA RANDOL AND BRUCE RANDOL, JR.,
Petitioners,

v.

MID-WEST NATIONAL LIFE INSURANCE COMPANY OF TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether an employer "established or maintained" an "employee welfare benefit plan" subject to the Employee Retirement Income and Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA") when the employer (1) allowed a representatives of the insurer to discuss the coverage at the place of employment and on company time; (2) paid the first month premiums for its employees who chose to participate; (3) contributed $75 per month per employee to help defray costs of health coverage for its employees and to provide an incentive for the employees to obtain health coverage; (4) established a payroll deduction program to collect the remaining balance of the premiums for coverage for its employees and their dependents; and (5) allowed the insurer to draft the corporate bank account to pay the premiums for coverage.

RULE 29.1 STATEMENT

Mid-West National Life Insurance Company of Tennessee is a subsidiary of United Insurance Companies, Inc.

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BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent Mid-West National Life Insurance Company of Tennessee ("Mid-West"), respectfully requests that this Court deny the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

INTRODUCTION

Petitioners ask this Court to overrule the *en banc* decision by the Eleventh Circuit in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (*en banc*) on the basis that a conflict exists between *Donovan* and decisions from other circuits. There is no such conflict, however, inas-

much as the First,[1] Third,[2] Fifth,[3] Sixth,[4] Seventh,[5] Eighth,[6] Ninth [7] and Tenth [8] Circuits *all* have followed the test established in *Donovan* concerning whether a "plan" exists. No contrary decision has been rendered by any circuit which has addressed the issue. A number of United States District Courts also have followed the *Donovan* test.[9] Petitioners, however, invite the Court to

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[1] *See Wickman v. Northwestern Nat. Ins. Co.*, 908 F.2d 1077 (1st Cir.), *cert. denied*, 498 U.S. 1013 (1990).

[2] *See Deibler v. United Food & Commercial Workers' Local Union 23*, 973 F.2d 206 (3d Cir. 1992).

[3] *See Meredith v. Time Ins. Co.*, 980 F.2d 352 (5th Cir. 1993); *Hansen v. Continental Ins. Co.*, 940 F.2d 971 (5th Cir. 1991); *Kidder v. H & B Marine, Inc.*, 932 F.2d 347 (5th Cir. 1991); *Gahn v. Allstate Life Ins. Co.*, 926 F.2d 1449 (5th Cir. 1991); and *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d (5th Cir. 1990).

[4] *See Fugarino v. Hartford Life & Acc. Ins. Co.*, 969 F.2d 178 (6th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 1401, 122 L.Ed.2d 774 (1993); *International Resources, Inc. v. New York Life Ins. Co.*, 950 F.2d 294 (6th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 2941, 119 L.Ed.2d 565 (1992); *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546 (6th Cir. 1989).

[5] *See James v. National Business Sys.*, 924 F.2d 718 (7th Cir. 1991).

[6] *See Harris v. Arkansas Book Co.*, 794 F.2d 358 (8th Cir. 1986).

[7] *See Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985).

[8] *See Peckham v. Gem State Mut. of Utah*, 964 F.2d 1043 (10th Cir. 1992); *Roe v. General Am. Life Ins. Co.*, 712 F.2d 450 (10th Cir. 1983).

[9] *See, e.g., Moeller v. Bertrang*, 801 F. Supp. 291 (D.S.D. 1992); *Allmendinger v. Aetna Life Ins. Co.*, 804 F. Supp. 432 (D. Conn. 1992); *Sims v. Lumbermens Mut. Casualty Co.*, 789 F. Supp. 781 (S.D. Miss. 1992); *McCaslin v. Blue Cross & Blue Shield of Ala.*, 779 F. Supp. 1312 (N.D. Ala. 1991); *Miller v. National Brokerage Servs.*, 782 F. Supp. 1440 (D. Nev. 1991); *Thomas v. Burlington Indus.*, 763 F. Supp. 1570 (S.D. Fla. 1991); *Walters v. Pan Am. Life Ins. Co.*, 800 F. Supp. 436 (S.D. Miss. 1990); *Garred v. General Am. Life Ins. Co.*, 723 F. Supp. 1325 (W.D. Ark. 1989), *appeal*

adopt the holding of *Taggart Corp. v. Life & Health Benefits Administration*, 617 F.2d 1208 (5th Cir. 1980), *cert. denied, sub nom. Taggart Corp. v. Efros,* 450 U.S. 1030 (1981), a pre-*Donovan* decision by the Fifth Circuit which later was expressly limited to its facts by the Fifth Circuit itself in *Memorial Hospital System v. Northbrook Life Insurance Co.*, 904 F.2d 236 (5th Cir. 1990).

JURISDICTION

Mid-West agrees with petitioners' statement concerning jurisdiction.

STATUTES AND REGULATION INVOLVED IN THE CASE

1. United States Code, 29 U.S.C. § 1002(1) provides, in pertinent part:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing its participants or their beneficiaries, *through the purchase of insurance* or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions or retire-

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denied, 902 F.2d 1576 (8th Cir. 1990); *James v. National Business Sys.*, 721 F. Supp. 169 (N.D. Ind. 1989), *vacated on other grounds*, 924 F.2d 718 (7th Cir. 1991); *McIntyre v. Okurowski*, 717 F. Supp. 10 (D. Mass. 1989); *Dodd v. John Hancock Mut. Life Ins. Co.*, 688 F. Supp. 564 (E.D. Cal. 1988); *Rasmussen v. Metropolitan Life Ins. Co.*, 675 F. Supp. 1497 (W.D. La. 1987); and *Blue Cross & Blue Shield of Ala. v. Peacock's Apothecary, Inc.*, 567 F. Supp. 1258 (N.D. Ala. 1983).

ment or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1) (emphasis added).

2. United States Code, 29 U.S.C. § 1132(a)(1)(b) provides, in pertinent part:

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of his section, or
>
> (B) the recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the plan;

29 U.S.C. § 1132(a)(1)(B).

3. United States Code, 29 U.S.C. § 1132(e)(1) provides, in pertinent part:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

29 U.S.C. § 1132(e)(1).

4. United States Code, 29 U.S.C. § 1144(a) provides, in pertinent part:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

29 U.S.C. § 1144(a).

5. The Department of Labor's Safe Harbor regulation provides, in pertinent part:

> (j) Certain group or group-type insurance programs. For purposes of title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a group or group-type insurance program offered by an insurer to employee or members of an employee organization, under which
>
> (1) no contributions are made by an employer or employee organization;
>
> (2) participation in the program is completely voluntary for employees or members;
>
> (3) the sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and
>
> (4) the employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs.

29 C.F.R. § 2510.3-1(j) (1992).

STATEMENT OF THE CASE

A. Course of Proceedings Below

Mid-West agrees with petitioners' statements concerning the course of the proceedings below.

B. Facts Relevant to ERISA Issue

Mid-West does not agree with petitioners' statements concerning the facts relevant to the issues presented in

this petition. For the sake of brevity, Mid-West refers the Court to the statement of facts contained in the Eleventh Circuit's opinion set forth in Appendix A to the Petition for Writ of Certiorari.

C. The Eleventh Circuit's Decision

Contrary to petitioners' statement, the Eleventh Circuit thoroughly examined all of the facts and circumstances before determining that the employer established or maintained a plan. Petitioners' arguments ignore the Eleventh Circuit's opinion in this case, wherein the court stated:

> Since the instant insurance plan qualifies as a "plan, fund, or program," as that terms is used in § 1002(1), then whether the plan satisfies the full § 1002(1) definition of an ERISA employee welfare benefit plan depends on whether it was "established or maintained by [the] employer." We hold that *through his actions the employer in this case has "maintained" the plan within the meaning of ERISA*. The employer wrote the first check purchasing the policies, established a system whereby the premiums would be paid monthly by a means of a bank draft on the corporate account, contributed $75 per employee per month toward the premiums, and collected from the employees the balance of the premiums through a withholding system. Moreover, the employer did the foregoing in order to facilitate his employees' obtaining health coverage. We find these undisputed facts amply demonstrate that the employer "maintained" the plan.

Petition for Writ of Certiorari at 8a-9a (emphasis added). This language refutes petitioners' assertions that the Eleventh Circuit failed to thoroughly examine the employer's conduct or intent. Additionally, contrary to petitioners' contention that the employer did "virtually nothing . . . [except] check [my] statement once a month to see that the premium had been deducted" (Petition for Writ of Certiorari at 4), the undisputed facts established the

employer paid the first month's premiums, contributed $75 per month, established a payroll deduction program and allowed the corporate bank account to be drafted.

SUMMARY OF ARGUMENT

Contrary to petitioners' contentions, this decision and *Donovan* are not in conflict with any decision by this Court or the Fifth Circuit's decision in *Hansen*. The *Donovan* test has been adopted and followed by nine of the twelve Circuit Courts of Appeal. Inimical to petitioners' assertions, the *Donovan* test has not been rejected, either explicitly or implicitly, by a single circuit court of appeals. Petitioners also have misconstrued the Eleventh Circuit's opinion in this case. The Eleventh Circuit did not hold that, simply because the *Donovan* test [10] had been satisfied, the plan was automatically an ERISA plan. Instead, the Eleventh Circuit, after holding a plan existed, analyzed the employer's involvement to determine whether the plan was an ERISA plan. Accordingly, this petition presents no "special and important reasons" justifying granting the writ as required by Rule 10.1. S.Ct. R. 10.1.

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[10] In *Donovan*, the Eleventh Circuit held:

> In determining whether a plan, fund or program (pursuant to a writing or not) is a reality a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits.

Donovan, 688 F.2d at 1373.

ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE ELEVENTH CIRCUIT'S HOLDING AND ANY APPLICABLE DECISION OF THIS COURT

Petitioners misinterpret this Court's decisions in *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1 (1987), and *Massachusetts v. Morash,* 490 U.S. 107 (1989), in an attempt to invent a conflict between those decisions and the Eleventh Circuit's holding in this case.

In *Fort Halifax,* this Court addressed whether ERISA preempted a Maine statute, which required a one-time severance payment in the event of a plant closing. *Fort Halifax,* 482 U.S. at 3-4. This Court held ERISA preemption did not apply because the statute neither established nor required an employer to "maintain" an "employee welfare benefit plan." *Id.* at 6. The basis for this Court's decision was:

> The Maine statute neither establishes, nor requires an employer to maintain, an employee benefit *plan.* The requirement of a one-time lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation. *The employer assumes no responsibility to pay benefits on a regular basis, and thus faces no periodic demands on its assets that create a need for financial coordination and control. Rather, the employer's obligation is predicated on the occurrence of a single contingency that may never materialize.* The employer may well *never* have to pay the severance benefits. To the extent that the obligation to do so arises, satisfaction of that duty involves only making a single set of payments to employees at the time the plant closes. To do more than write a check hardly constitutes the operation of a benefit plan. Once this single event is over, the employer has no further responsibility. The theoretical possibility of a one-time obligation in the future simply creates no

> need for an ongoing administrative program for processing claims and paying benefits.

Id. at 12 (emphasis added in part). Not only is *Donovan* not in conflict with *Fort Halifax,* this Court in *Fort Halifax* expressly cited *Donovan* for the proposition that a decision to extend benefits was not the establishment of a plan. *Id.* at 12, n.6.

In the case *sub judice,* the employer did more than write a check for a one-time lump-sum payment. The employer wrote a check for the first month's premiums; contributed $75 per month per employee; established a payroll deduction program to collect the remaining balance of the premiums from the employees; and allowed the company bank account to be drafted to pay the premiums. By doing so, the employer assumed a responsibility to pay certain benefits on a regular basis, i.e. $75 per month per employee. The Eleventh Circuit correctly held that the type of employer activity present in this case constituted "maintenance" of a plan and involved a great deal more than "writing a check." Therefore, the Eleventh Circuit's decision was correct and does not conflict with *Fort Halifax.*

In *Morash,* this Court addressed whether ERISA preempted a Massachusetts statute requiring an employer to pay unused vacation time to a discharged employee and imposing criminal sanctions for violations of the statute. *Morash,* 490 U.S. at 109. This Court held ERISA did not preempt the statute and stated:

> Because ordinary vacation payments are typically fixed, due at known times, and do not depend on contingencies outside the employee's control, they present none of the risks that ERISA is intended to address. If there is no danger of defeated expectations, it is no different from the danger of defeated expectations for wages for services performed—a danger Congress chose not to regulate in ERISA.

> This conclusion is supported by viewing the reference to vacation benefits not in isolation but in light of the words that accompany it and give the provision meaning. Section 3(1) subjects to ERISA regulation plans to provide medical, sickness, disability, and death benefits, training programs, day care centers, scholarship funds, and legal services. *The distinguishing feature of most of these benefits is that they accumulate over a period of time and are payable only upon the occurrence of an contingency outside the control of the employee.* . . .

Id. at 115-16 (emphasis added).

In *Morash,* the vacation benefits were "fixed, due at known times, and [did] depend on contingencies outside the employee's control." In the present case, although the contributions by the employer were fixed and due at known times, the employee welfare benefit plan at issue was a plan to provide medical, surgical or hospital care benefits, or benefits in the event of sickness. The benefits payable under the plan was not "fixed, due at known times" and payment did depend on contingencies outside the employee's control. The benefits, other than the employer's contribution, were payable only when there was a claim for medical, surgical or hospital care. Such claims were based on contingencies outside the control of petitioners. Accordingly, there is no conflict between the Eleventh Circuit's decision and *Morash.*

II. THERE IS NO CONFLICT BETWEEN THE ELEVENTH CIRCUIT'S HOLDING AND ANY APPLICABLE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME MATTER

Petitioners incorrectly argue that the "plan" test established in *Donovan* basically asks "Is there a plan?" and does not examine the employer's involvement in the plan. This argument ignores that the Eleventh Circuit, in the case at bar, first determined a "plan" existed, then examined the employer's involvement to determine whether the plan was indeed an ERISA plan. Moreover, petition-

ers' reliance on *Hansen*[11] and *Taggart*[12] is misplaced. Examination of *Hansen* reveals the Fifth Circuit relied on *Donovan* in rendering its decision and no conflict exists. Additionally, *Taggart* has been limited to its facts not only by the Eleventh Circuit in *Donovan* but by the Fifth Circuit in *Memorial Hospital,*[13] when it adopted *Donovan*'s limitation of *Taggart.*

As regards petitioners' safe harbor argument, there is no dispute that the plan in this case was not exempted from ERISA by the Safe Harbor regulation, 29 C.F.R. § 2151.3-1(j) by reason of the employer's contributions on behalf of the employees. Moreover, petitioners' argument concerning application of the Safe Harbor factors in analyzing the employer's involvement in the plan ignores the Eleventh Circuit's examination of the employer's conduct in the instant case. After determining the safe harbor regulation did not apply and a plan existed, the Eleventh Circuit examined the nature and degree of the employer's involvement in the plan before concluding the plan was an "employee welfare benefit plan" which was "maintained" by the employer and, therefore, subject to ERISA. Petition for Writ of Certiorari at 8a-9a. Consequently, as the opinion itself reveals, there is no merit in the argument that the Eleventh Circuit failed to examine the employer's conduct before deciding the plan was "maintained" by the employer.

Additionally, petitioners erroneously claim the employer did not have any administrative involvement with the plan. The Tenth Circuit has addressed this same argument and stated "[petitioners'] contention that [the employer's] function is not "administrative" appears to arise from the mistaken assumption that an employer does not administer a plan unless he controls eligibility for cover-

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[11] 940 F.2d 971.

[12] 617 F.2d 1208.

[13] 904 F.2d 236.

age and processes claims for benefits under the plan." *Peckham*, 964 F.2d at 1048, n.9. In response, the Tenth Circuit stated:

> We do not believe that *Fort Halifax* requires an employer to exercise control over eligibility or claims —essentially to play the role of an insurer—or even to be in direct contact with the insurer. *An "employee welfare benefit plan" is specifically defined to include employers' provision of benefits "through . . . insurance or otherwise. . . . Presumably, in most instances where an employer provides benefits through the purchase of insurance, the insurer rather than the employer makes determinations regarding eligibility and claims.*

Id. (emphasis added).

Contrary to petitioners' arguments, there is no conflict between the Eleventh Circuit's decision in this case and *Hansen*. Both the present case and *Hansen* relied upon the test established in *Donovan* to determine whether a "plan" existed and, upon determining a plan existed, both decisions examined the employer's involvement in deciding whether the plan was an "employee welfare benefit plan" which was "established or maintained" by the employer. In examining the issues, both circuits consider (1) whether the plan was excluded by the safe harbor regulation; (2) if not excluded, whether a "plan" existed; and (3) if a "plan" existed, whether the plan was "established or maintained" by the employer. The *Hansen* language quoted by petitioners on page 23 demonstrates that the employee welfare benefit plan at issue was subject to ERISA. As to the employer's involvement, the Fifth Circuit stated: "[t]hus, if an employer does no more than purchase insurance for [its] employees, and has no further involvement with the *collection of premiums*, administration of the policy, *or* submission of the claims, [it] has not established an ERISA plan." *Hansen*, 940 F.2d at 978 (emphasis added). In this case, it is undisputed that the employer had further involvement with the

collection of premiums and, a significant factual distinction from *Hansen*, contributed $75 per month per employee to help defray the cost of coverage.

Petitioners' argument misstates the *Hansen* language which states "the evidence must show that the employer had an "intent to provide its employees with a welfare benefit program through the purchase and maintenance of [the] group insurance policy." *Hansen*, 940 F.2d at 978. Such evidence of intent was present in this case and noted by the Eleventh Circuit, which stated: "in order to help the employees purchase the insurance and to provide an incentive for them to do so, [the employer] decided to contribute $75 toward the monthly premium for each employee choosing to participate." Petition for Writ of Certiorari at 3a. Consequently, in the case *sub judice*, the employer had "a purpose to provide health insurance" to its employees. *Hansen*, 940 F.2d at 978. Therefore, the Eleventh Circuit's opinion does not conflict with *Hansen*.

Petitioners' reliance upon *Taggart* [14] is misplaced because *Taggart* has been limited not only by the Eleventh

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[14] *Taggart* is factually distinguishable because in *Taggart* the corporation was providing benefits for its sole employee, who was the President of the corporation and although it is not clear from the facts was probably the sole shareholder. Under the regulations promulgated by the Department of Labor, this plan would have been excluded from ERISA. 29 C.F.R. § 2510.3-3 (1992), provides in pertinent part:

> (a) *General.* This section clarifies the definition in section 3(3) of the term "employee welfare benefit plan" for the purposes of title I of the Act and this chapter. It states a general principle which can be applied to a large class of plans to determine whether they constitute employee benefit plans within the meaning of section 3(3) of the Act. Under section 4(a) of the action, only employee benefit plans within the meaning of section 3(3) are subject to title I.
>
> (b) *Plans without employees.* For purposes of title I of the Act and this chapter, the term "employee benefit plan"

Circuit in *Donovan* but also by the Fifth Circuit in *Memorial Hospital*, which adopted *Donovan*'s limitation. In *Donovan*, the Eleventh Circuit limited *Taggart* by stating:

> If *Taggart* implies that an employer or employee organization *that only purchases a group health insurance policy or subscribes to a MET to provide health insurance to its employees or members cannot be said to have established or maintained an employee welfare benefit plan, we disagree.* To that extent *Taggart* shall no longer be binding in the Eleventh Circuit.

Donovan, 688 F.2d at 1375 (emphasis added). Likewise, in *Memorial Hospital* the Circuit itself limited *Taggart* and held:

> Although we held in *Taggart* that the purchase of an insurance policy does not, in and of itself, establish the existence of an ERISA plan, we certainly did not hold, contrary to Memorial's argument, that an employer's purchase of health insurance offers no

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shall not include any plan fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a so-called "Keogh" or "H.R. 10" plan under which only partners or only a sole proprietor are participants covered under the plan will not be covered by title I. However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under title I. Similarly, partnership buyout agreements described in section 736 of the Internal Revenue Code of 1954 will not be subject to title I.

(c) *Employees.* For the purposes of this section:

(1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, and . . .

29 C.F.R. § 2510.3-3 (1992).

evidence of an intent to provide such a plan. We agree with the reasoning of the Eleventh Circuit that

> the purchase of insurance does not conclusively establish a plan, fund, or program, but the purchase is evidence of the establishment of a plan, fund, or program; the purchase of a policy or multiple policies covering a class of employees offers substantial evidence that a plan, fund or program has been established.

Donovan, 688 F.2d at 1373.

Memorial Hospital, 904 F.2d at 242. *See also, Kidder,* 932 F.2d at 352-53.

Unlike *Taggart,* petitioners obtained health coverage under a plan where the employer (1) contributed $75 per month per employee; (2) established a payroll deduction program to collect the remaining balance of the premiums from the employees; and (3) allowed Mid-West to draft the company bank account to pay the monthly premiums. Here, there was "an employer-employee-plan relationship that was lacking in *Taggart.*" *Memorial Hospital,* 904 F.2d at 243. Accordingly, there is no conflict between the decisions of the Fifth Circuit and Eleventh Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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